

Abuse of Process

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The recent decision of Justice Nordheimer in *Westjet Airlines Ltd. v. Air Canada*, [2005] O.J. No. 2310 deals with the tort of abuse of process. The case is part of a larger ongoing litigation battle between two Canadian airline companies.

In short, the decision makes it clear that the tort of abuse of process will rarely be available in the context of ongoing litigation; the mere pursuit of litigation, even litigation without merit, will, standing alone, not amount to an abuse of process. Dealing with the issue of abuse of process the Court notes, at para 4:

In support of its claim, WestJet asserts that the Air Canada action was instituted "with the improper goal of damaging the business and reputation of WestJet, damaging WestJet's ability to compete with Air Canada and, ultimately, destroying WestJet as a competitor of Air Canada". It is also asserted that the individual defendants, who are all either current or former executives of Air Canada, have conspired with one another and with Air Canada to effect this objective and also to benefit themselves personally as well as Air Canada.

The claim for abuse of process appeared to be limited to the issuance of the claim and pursuit of the litigation itself. Justice Nordheimer found such a plea was insufficient. An abuse of process requires something more than the mere pursuit of litigation -- something else, some wrongful purpose and some act beyond the litigation process is required. As the Court in *Metrick v. Deeb* (2003), 16 C.C.L.T. (3d) 298 (Ont. C.A.) notes:

The essential elements of abuse of process are: first, a collateral and improper purpose, such as extortion, and secondly, a definite act or threat, in furtherance of a purpose not legitimate in the use of the process. Some such overt conduct is essential, because there is clearly no liability when the defendant merely employs regular legal process to its proper conclusion, albeit with bad intentions.

In concluding that the plea was insufficient to meet the two elements the Court held, at paras. 18 to 21:

18. Finally, in this regard, I should mention the decision in *Scintilore Explorations Ltd. v. Larche* (1999), 48 B.L.R. (2d) 248 (Ont S.C.J.) where Mr. Justice Shape, in dealing with the claim of abuse of process in that case, said at para. 221:

"There is no evidence that the claim was brought to threaten or coerce Larche or McKinnon to do anything. While I do not say that the tort can only made out where there has been an attempt to coerce the defendant, that factor appears to have been present in all the cases to which I have been referred."

19. The improper purpose relied upon by WestJet as part of the necessary foundation for its claim is that Air Canada set out to damage and ultimately "destroy" it. It is not clear to me that by simply employing a relatively pejorative term such as "destroy" one can satisfy the requirement of a collateral and improper purpose. It must first be recognized that there is a difference between purpose and motive. Many actions may result in the extinguishment of a defendant because the defendant does not have the resources available to answer any judgment that may ultimately be rendered. It may also be the case that actions are commenced by one competitor against another with the view to not only obtaining the relief sought in the claim but also the possible elimination of that competitor, whether directly or indirectly. While that may be an improper motive, that is not necessarily the same thing as being an improper purpose. If the action itself is trumped up or completely spurious, the institution of the action for the goal of driving a competitor out of business might well be found to be instituted for an improper

purpose since there would be no associated valid basis for the claim. However, if there is some basis for the claim, it seems to me that it then becomes difficult to characterize the action as having been instituted for an improper purpose just because a by-product of its successful prosecution may be the elimination of the defendant as a competitor. Rather, such situations would appear to fall into the category of claim where, as the quotation in *Metrick v. Deeb*, supra, observed, there is no liability when the defendant properly employs the legal process but with bad intentions.

20 Assuming, however, that the facts of this case would satisfy the requirement of a collateral and improper purpose, there is nothing in the pleaded facts that would satisfy the second requirement of a definite act or threat in furtherance of a purpose not legitimate in the use of the process and outside of its scope. This requirement has been variously referred to in the cases as a "threat", "coercion", "a club" or other like expressions. Whether, as Mr. Justice Sharpe says, it is necessary for the act to rise to that level, it is nevertheless clear from the cases that there must have been some overt act done by the defendant to effect a purpose that is outside of the scope of the action. In other words, there must be an identifiable objective that the defendant wished to achieve that it could not achieve through the action itself. This requirement is described in *Fleming on Torts* (9th ed., 1998) at p. 688, in the following terms:

In addition to the improper purpose, there must be some overt act or threat distinct from the proceedings themselves, in furtherance of that purpose, such as in the abovementioned case the extortion accompanying the *capias*. Were it otherwise, any legal process could be challenged on account of its 'hidden agenda' [footnote omitted].

21. I am unable to find in the statement of claim any such overt conduct by the defendants that would satisfy this second requirement.

The decision of the Court is useful as setting out the limits on abuse of process. Litigation (even without a shadow of merit) pursued properly is subject to cost sanctions but not an abuse of process claim.

** This article is intended to provide general information and is not specific legal advice.
If you have a legal problem, you should not rely on this article alone but should speak to a lawyer.
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